BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

COLEEN PIERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,808
THREE RIVERS, INC.	)	
Respondent	)	
AND	)	
	)	
FARM BUREAU MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and claimant both appeal from the Award entered by Administrative Law Judge Bryce D. Benedict on October 29, 1998, as amended by the Nunc Pro Tunc Award on November 4, 1998. The Board heard oral argument on May 26, 1999.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. John D. Conderman of Manhattan, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent and claimant both appeal findings and conclusions relating to the nature and extent of claimant's disability. The ALJ found claimant's disability to be a 52 percent work disability for injury to the low back. On appeal, respondent contends the ALJ erred by rejecting the task list prepared by Ms. Karen C. Terrill and by relying instead on the task list prepared by Mr. Bud Langston. Claimant, on the other hand, contends the ALJ erred by failing to include injury to claimant's neck. Claimant also asks the Board to reverse the ALJ's decision to deny claimant's request to be paid for chiropractic treatment and related mileage expense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant should be awarded benefits based on a 29.5 percent work disability and should be awarded the expenses for chiropractic treatment and related mileage. The Board finds claimant has not proved that the cervical spine injury arose out of claimant's employment with respondent.

Findings of Fact

1. Claimant, a home health aide, injured her low back on December 10, 1996, while assisting a patient in a recliner. Later the same day claimant could not straighten up after bending over to put a sheet on a bed. Claimant had also injured her low back in November 1996 while working as a part-time worker for the U.S. Postal Service. Claimant was off work following the Postal Service injury but was released without restrictions on November 22, 1996. After the injury that occurred while working for respondent on December 10, 1996, claimant was not able to return to work.

2. After the December 10, 1996 injury, claimant went first to Alison L. Mueller, a certified family nurse practitioner. Ms. Mueller was an employee of the Marysville Hospital and had seen claimant after the injury while working for the Postal Service. Claimant initially made no complaint of neck symptoms to Ms. Mueller. Claimant did complain of neck pain on February 7, 1997, and had by this time developed muscle spasm in the right side of her neck. Although claimant later testified she had injured her neck in the December accident and did not believe it was from an altered gait, Ms. Mueller concluded the neck problems developed as a result of the low back injury.

3. Claimant testified Ms. Mueller sent her to a chiropractor. Ms. Mueller was authorized to provide treatment. Claimant had $688.20 in mileage expense for 19 round trips of 126 miles each to see the chiropractor. The expense for the chiropractor's treatment was $1,084.

4. Claimant also received treatment at the direction of Dr. Glenn M. Amundson, an orthopedic surgeon. Dr. Amundson first saw claimant February 18, 1997, and continued to treat claimant through March 12, 1998. Dr. Amundson ultimately rated claimant's impairment as 5 percent of the whole body with 2.5 percent attributed to the November accident and 2.5 percent attributed to the December accident. He recommended restriction to light physical demand work or less, occasional lifting to 20 pounds, and recommended claimant avoid sustained or awkward postures of the lumbar spine and avoid repetitive bending, pushing, pulling, twisting, or lifting.

Dr. Amundson refused to attribute claimant's alleged neck injury to the work-related accident. He noted there was no documented history of cervical complaints related to the

on-the-job injury and he did not believe there was a connection between a low back problem and later neck problems.

5. Mr. Langston, an employment expert, met with claimant and prepared a list of the tasks claimant had performed in the work she did during the 15 years before the accident. Mr. Langston identified and described a total of 16 tasks performed during that period. Mr. Langston did not testify but claimant examined the list and testified it was accurate.

6. Dr. Amundson reviewed the task list prepared by Mr. Langston and was asked whether claimant could perform those tasks. Although Dr. Amundson gave qualified answers in several instances, it appears he considered claimant unable to perform approximately 50 percent of those tasks because of the back injury alone.

7. Ms. Terrill, also an employment expert, prepared a second list of the tasks claimant had done in the 15 years before the accident. She identified a total of 32 tasks. Ms. Terrill testified by deposition her list was based on information claimant provided in a telephone interview, but claimant did not testify to the accuracy of Ms. Terrill's task list.

8. Dr. Daniel D. Zimmerman examined claimant at the request of claimant's counsel. He rated both the cervical problem, which he considered to be a result of the on-the-job injury, and the lumbar spine problems. He assigned a 14 percent of the whole body rating for the cervical condition and 13 percent for the lumbar spine injury. He recommended claimant limit lifting to 20 pounds occasionally and 10 pounds frequently. He also recommended claimant avoid hyperflexion and hyperextension of the cervical spine and avoid holding her neck in a captive position for extended periods of time. He further recommended claimant avoid frequent flexing of the lumbosacral spine and avoid frequent bending, stooping, squatting, crawling, and kneeling.

Dr. Zimmerman reviewed the task list prepared by Mr. Langston and concluded claimant cannot, because of the lumbar injury, perform 13 of the 16 tasks for an 81 percent loss.

9. Dr. Peter V. Bieri performed an independent medical examination at the direction of the ALJ. He saw claimant on November 10, 1997. He rated the impairment as 7 percent of the whole body for the lumbar spine and 6 percent of the whole body for the cervical. But he stated he could not conclusively attribute any of the cervical impairment to the on-the-job injury. He restricted claimant to light physical demand work with lifting limited to 20 pounds up to one-third of the time and frequent lifting not to exceed 10 pounds. He recommended negligible constant lifting. He applied the same limits to carrying, pushing, and pulling.

Dr. Bieri reviewed both Mr. Langston's and Ms. Terrill's task lists. Using the tasks identified by Ms. Terrill, he opined claimant cannot do 8 of the 32 (25 percent) based on the lumbar spine only. Using Mr. Langston's list, he opined claimant could not do 9 of 16

(56 percent) because of the lumbar injury and he was uncertain about one additional task, Task No. 14, because he was not certain about the weight involved. Since claimant has the burden of proving the loss, this will be treated as evidence that claimant cannot do 9 of 16 or 56 percent. Task No. 14 will be treated as one claimant can do.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. In this appeal, respondent disputes the task loss finding by the ALJ. Specifically, respondent contends the ALJ should have relied on the task loss opinion by Dr. Bieri based on the task list of Ms. Terrill. The ALJ rejected the opinion of Ms. Terrill based, in part, on the fact that claimant did not testify to the accuracy of Ms. Terrill's task list. Respondent contends the ALJ should not have relied on the list prepared by Mr. Langston because Mr. Langston did not testify.

The Board does not consider it necessary for Mr. Langston to testify where the claimant has reviewed the task list and testified the list accurately represents the tasks she performed. Conversely, the Board does not consider it necessary for the claimant to testify to the accuracy of the task list prepared by Ms. Terrill where Ms. Terrill has testified that she obtained the list based on information claimant provided. Even though Ms. Terrill's list may then be hearsay, claimant remains available to testify if either party wishes to examine claimant about the information. The circumstances are analogous to the hearsay exception found in K.S.A. 60-460(a) and K.A.R. 51-3-8(c). For this reason, the Board considers the opinion of Dr. Bieri, based on the list prepared by Ms. Terrill, to be admissible evidence entitled to weight in the determination of the task loss.

4. The Board agrees with and affirms the finding by the ALJ that the claimant has not proven the alleged neck injury arose out of and in the course of employment. Neither Dr. Amundson nor Dr. Bieri considered the history of complaints indicative of a work-related neck injury. Ms. Mueller did think the neck injury was work related but her version

of the events, that the back injury caused a neck injury, is not plausible. Dr. Zimmerman thought the neck injury to be work related but his version of the events, that the neck was injured at the time of the original accident, is not consistent with the history shown in the medical records.

5. The Board finds the chiropractic treatment and related medical expense should be reimbursed by respondent. Ms. Mueller was considered authorized. She referred claimant to Dr. Amundson and that referral is not questioned. In fact, respondent does not dispute Ms. Mueller's authority to make a referral, respondent questions whether a referral for chiropractic care was, in fact, made. But claimant's testimony that Ms. Mueller referred her for chiropractic care is not contradicted in the record, and the Board does not consider the testimony to be unreliable or unbelievable.

Claimant attached to her brief on appeal additional evidence on this issue. This evidence was not admitted before the ALJ and has not, for that reason, been considered or relied upon by the Board. K.S.A. 44-555c.

6. The ALJ found claimant had not made a good faith effort to find employment and accordingly imputed a postinjury wage of $6 per hour to find an 18 percent wage loss in calculating work disability. The $6 per hour was based on the opinion of Ms. Terrill. On appeal, neither party has expressly challenged this finding. The Board agrees with and adopts the ALJ's finding that claimant has an 18 percent wage loss.

7. The Board adopts the task loss opinions of the court-appointed independent medical examiner, Dr. Bieri. He has given an opinion, considering the lumbar spine injury only, for the restrictions of the task lists of both Ms. Terrill and Mr. Langston. Both task lists have some flaws. Mr. Langston's is, in some respects, too general. Ms. Terrill's does not always provide full information on the weights involved. The Board concludes it is appropriate to give equal weight to the opinion of Dr. Bieri based on Ms. Terrill's list, a 25 percent loss, and Dr. Bieri's opinion based on Mr. Langston's list, a 56 percent loss. The Board therefore finds claimant has a 41 percent task loss. The Board also notes this approximates the task loss opinion of the treating physician, Dr. Amundson.

8. The Board finds claimant has a 29.5 percent work disability based on an 18 percent wage loss and a 41 percent task loss. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on October 29, 1998, as amended by the Nunc Pro Tunc Award on November 4, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Coleen Pierson, and against the respondent, Three Rivers, Inc., and its insurance carrier, Farm Bureau Mutual Insurance Company, for an accidental injury which occurred December 10, 1996, and based upon an average weekly wage of $290, for 33 weeks of temporary total disability compensation at the rate of $193.34 per week or $6,380.22, followed by 117.12 weeks at the rate of $193.34 per week or $22,643.98 for a 29.5% permanent partial disability, making a total award of $29,024.20, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
John D. Conderman, Manhattan, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director